SUBJECT INDEX

	Page
Statement of the case	1
Reply to Appellee's argument in support of the motion	5
1. The Supreme Court has not heretofore passed upon the issues presented on the present appeal	5
2. The California Tax Law, as interpreted, produces an unconstitutional allocation of revenues	8
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

Aero Mayflower Transit Co. v. Railroad Commissioners, 332 U.S. 495, 92 L. ed. 99, 68 S. Ct. 167 ..... 5, 7

Canton R. Co. v. Rogan, 340 U.S. 511, 95 L. ed. 488, 71 S. Ct. 447 ..... 5, 6, 10

Central Greyhound Lines v. Mealey, 334 U.S. 653, 92 L. ed. 1633, 68 S. Ct. 1260 ..... 5, 7, 11

Galveston etc. R. Co. v. Texas, 210 U.S. 217, 52 L. ed. 1031, 28 S. Ct. 638 ..... 9, 13

Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 93 L. ed. 1613, 69 S. Ct. 1264 ..... 5, 6, 7, 10

Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422, 91 L. ed. 993, 67 S. Ct. 815 ..... 9, 13

Lehigh Valley Railroad Co. v. Pennsylvania, 145 U.S. 192, 36 L. ed. 672, 12 S. Ct. 806 ..... 5, 7, 12

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 98 L. ed. 583, 74 S. Ct. 396 9

Statutes

California Revenue and Taxation Code, Sec. 9606 .. 3

United States Code, Title 49, Sec. 20(11) 5

United States Code, Title 49, Sec. 216(f) 5, 12

United States Code, Title 49, Sec. 223 5

United States Constitution, Art. I, Sec. 8 1

United States Constitution, Art. I, Sec. 10, cl. 2 6

IN THE

Supreme Court of the United States

October Term, 1964
No. 797

GILES W. STADLER and CLIFFORD V. STADLER, Executors of the Will of RALSTON J. STADLER, also known as R. J. STADLER, also known as RALSTON JOHN STADLER, Deceased,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

Reply of Appellants to Appellee's Motion to Dismiss or Affirm.

Statement of the Case.

The appeal is from a decision of the State Courts of California interpreting and applying a "gross receipts" tax levied against revenues derived from interstate transportation provided by Appellant jointly with other interstate carriers for a through origin-to-destination charge computed on the basis of joint through rates. The question for decision is whether the statute, as so interpreted and applied, runs afoul of the commerce clause, Article I, §8 of the Federal Constitution. The motion to dismiss or affirm is grounded solely upon the

contention that no substantial federal question is presented.

Some restatement of the case is required because Appellee's statements of facts and of the case do not present accurately the controversy which this court is called upon to decide.

As here pertinent, Appellant[1] was an interstate motor carrier operating over routes entirely within California. Jointly with other interstate motor carriers (and not independently as Appellee suggests), he participated in the transportation of shipments moving on through bills of lading between points on his lines in California and points outside of California. A single origin-to-destination charge was assessed for the through transportation predicted upon joint rates established in tariffs published and filed jointly by participating carriers. The collecting carrier divided the through charge with other carriers participating in the transportation in conformity with formulas established in pre-existing division agreements.

The formulas established in the carrier division agreements for division of the through charge were not based upon mileage proration. Originating and delivering carriers who performed documentation, collection, administrative, handling and other services in connection with the through transportation for the common benefit of all participating carriers received a greater portion of the through charge than that to which they would have been entitled had such charge been divided on a mileage proration basis. Appellant was in each instance either an originating or a delivering carrier.

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[1]For simplicity, the singular is used to designate both the decedent who was the taxpayer and his personal representatives.

The tax in question is one imposed to compensate the state for use of its highways and is predicated upon "gross receipts." In the statute "gross receipts" are defined as including all receipts from transportation operations entirely within California and a portion based upon mileage proration, of receipts from operations partly within and partly outside the state. (Cal. Rev. & Tax. Code §9606, Jurisdictional Statement, Appendix C, p. 14.)

As applied to revenues derived from joint through interstate transportation, the State Court's interpretation of the statute is that:

(1) The only portion of the total charge for the through transportation proratable under the statute is that portion which each participating carrier traversing California highways receives as his agreed division of such through charge; and

(2) The only miles to be considered for purposes of revenue proration are the miles traversed by each such carrier within and outside of California in the performance of his portion of the joint through service.

Under such interpretation, all sums received by Appellant from his participation in the joint through interstate transportation were treated as taxable "gross receipts."

This Court has decided many times whether state taxes are repugnant to the commerce clause of the Federal Constitution. Notwithstanding, this case appears to be a case of first impression under that

constitutional provision in several significant particulars:

(1) This appears to be the first case in which this Court has been asked to pass upon the propriety of a state tax for highway use predicated upon revenues derived from interstate transportation provided jointly by several carriers on through bills of lading for a single through charge assessed against a participant in such through transportation whose vehicles did not cross state lines.

(2) Here, apparently for the first time, a state asserts the right to segregate through interstate transportation into its "hauling" and "non-hauling" components in the apportionment of the revenues derived from such through transportation for tax purposes.

(3) On the State Court's tacit admission, this case presents for the first time the issue as to whether participating carrier divisions of revenues derived from through interstate transportation result *per se* in constitutionally proper allocations of such through revenues among the involved states for tax purposes.

Substantial federal questions are, therefore, presented by the appeal.

Reply to Appellee's Argument in Support of the Motion.

1. The Supreme Court Has Not Heretofore Passed Upon the Issues Presented on the Present Appeal.

Appellees first argument in support of the motion is that *Canton R. Co. v. Rogan,* 340 U.S. 511, 95 L. ed. 488, 71 S. Ct. 447 (1951) and *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 93 L. ed. 1613, 69 S. Ct. 1264 (1949) are controlling on the issues here raised and that *Aero Mayflower Transit Co. v. Railroad Commissioners,* 332 U.S. 495, 92 L. ed. 99 68 S. Ct. 167 (1947), *Central Greyhound Lines v. Mealey,* 334 U.S. 653, 92 L. ed. 1633, 68 S. Ct. 1260 (1948) and *Lehigh Valley Railroad Co. v. Pennsylvania,* 145 U.S. 192, 36 L. ed. 672, 12 S. Ct. 806 (1891) should be considered as persuasive. All of said cases are clearly distinguishable on their facts.

In the present case, the revenues taxed were derived from participation in the transportation of shipments then in the course of through movement in interstate commerce on a single through bill of lading and for single origin-to-destination charge, based upon published joint through rates. The joint through character of the transaction gives rise to rights and liabilities of each participant to the others and to third parties which do not exist otherwise. (See: 49 U.S.C. 20(11), 216(f), 223.) The tax here involved is a direct tax based on revenues to compensate the state for the use of its highways.

Canton R. Co. v. Rogan, 340 U.S. 511, *supra,* involved a Maryland franchise tax measured by gross receipts imposed on a domestic railroad corporation operating entirely within the City of Baltimore. Taxpay-

ers revenues were derived from charges made by it for switching freight cars between piers and lines of railroad, storage of goods pending forwarding, wharfage, weighing loaded freight cars and rental of cranes used in unloading vessels. The primary question was the validity of the taxing statute under the Import-Export Clause of the Constitution, Article I, §10, cl. 2. There is no suggestion either in the opinion of this Court or of the appealed decision of the state court (73 A. 2d 12) that the taxpayer derived any of its revenues from the participation in through transportation performed jointly with others. No problem of apportionment of charges for through transportation was presented. In short, none of the issues here posed were passed upon in the *Canton R. Co.* case.

Interstate Oil Pipe Line Company v. Stone, 337 U.S. 662, involved the validity of a Mississippi tax based on gross income for the "privilege" of operating an oil pipe line wholly within that state. Taxpayer's pipe lines were used to transport oil from tanks in oil fields to loading racks adjacent to railroads elsewhere in the state. The oil moved on local bills of lading showing field origin and rack destination in Mississippi at charges predicated on tariffs prescribing rates for local transportation. As this Court noted, the taxpayer also engaged in transportation of oil which was delivered within Mississippi into interstate trunk lines for ultimate delivery outside the state, but Mississippi did not attempt to tax receipts attributable to these through shipments.

The issues here involve through transportation under joint responsibility and the problem of proper apportionment of a through charge for state revenue tax pur-

poses. Neither of those questions were presented for decision in *Interstate Oil Pipe Line Company v. Stone, supra.*

Aero Mayflower Transit Co. v. Board of R. R. Commissioners, 332 U.S. 495, *supra, Central Greyhound Lines v. Mealey,* 334 U.S. 653, *supra,* and *Leigh Valley R. Co. v. Pennsylvania,* 145 U.S. 192, *supra,* all involved situations in which the taxpayer's participation in the transportation was not limited to one state. In this Court *Aero Mayflower Transit Co.* did not, in reality, involve a "gross receipts" tax! In the other two cases mentioned, the tax was approved only to the extent that it was levied on the portion of the through charge resulting from mileage proration.

The fact cannot be escaped that California is taxing through transportation in interstate commerce. In the context of the constitutional question raised under the commerce clause the State Court's interpretation of the taxing statute, as here applied, has the following consequences:

(1) There is no statutory allocation of the through charge;

(2) A single through interstate shipment is treated as a series of independent transactions for purpose of tax allocation of revenues;

(3) California always allocates to itself for computing tax for use of its portion of the highways traversed in the through transportation more of the through revenue than it would be entitled to so allocate on the mileage proration method approved by this Court in *Central Greyhound Lines v. Mealey,* 334 U.S. 653, *supra;*

(4) California allocates to itself for highway use tax computation purposes without apportionment all receipts for non-highway functions of the through transportation (such as documentation, handling, collection of charges, and processing of claims) performed by Appellant as the originating delivering carriers for the common benefit of all participating carriers; and

(5) For practical purposes, California taxes on an unapportioned basis all of Appellant's revenues derived from participation in through interstate transportation.

Each such circumstance gives rise to a substantial federal question under the commerce clause of the Federal Constitution, not one of which is answered in support of the motion in any of the cases Appellee has cited. Further, so far as Appellant has been able to discover, these questions have not been resolved in any other case. In the premises, consideration of the appeal on its merits is indicated.

2. The California Tax Law, as Interpreted, Produces an Unconstitutional Allocation of Revenues.

Appellee's arguments 2 and 3 (Motion pp. 7-11) are but different facets of the same contention. To avoid repetition, it is essential they be answered together in this reply.

The essence of the Appellee's position is that the requirements of the commerce clause are met because there is no possibility of a multiple burden of taxation *on appellant* from his participation in the interstate transportation involved. (Motion, pp. 6, 9.) The premises of the argument are that for purposes of testing

the validity of the taxing statute each participant is to be treated as having acted independently of all other participants and that no consideration need be given to the effect of the tax scheme upon the through transportation which is the source of the revenues being taxed.

As has already been noted, the revenues here being taxed are a portion of a charge for a single origin-to-destination interstate shipment. The transportation was performed by several carriers participating jointly in accomplishing the obligations imposed upon all of them under a through bill of lading contract. Appellant's activities were an integral part of this through movement of goods.

It is the through transportation and not Appellant's activities in relation thereto, which must be accorded the protection against the burden of multiple taxation. The through transportation cannot be deprived of that constitutional protection by the device of attempting to treat as unrelated to the through transportation those activities which take place physically within a single state but which are, in reality, part and parcel of the through interstate transportation. (*Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 91 L. ed. 993, 67 S. Ct. 815 (1947), *Galveston etc. R. Co. v. Texas*, 210 U.S. 217, 52 L. ed. 1031, 28 S. Ct. 638 (1908), *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 98 L. ed. 583, 74 S. Ct. 396 (1954):)

In *Galveston etc. R. Co. v. Texas, supra,* tax was levied upon railroads whose lines were entirely within Texas based on a percentage of their revenues. The railroads concerned connected with other lines and varying portions of their revenues taxed were derived from

transportation of persons or property coming from or destined to points without the state. The tax was held to bear upon interstate commerce and to be invalid as an attempt to regulate commerce among the states.

Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, *supra,* and *Canton R. Co. v. Rogan,* 340 U.S. 511, *supra,* relied upon by Appellee to support its contention that the through interstate transportation may be fragmented for the purpose of considering constitutionality under the commerce clause have already been discussed. As previously shown, *Interstate Oil Pipe Line Co. v. Stone,* did not, as Appellee asserts, involve the validity of a tax levied on revenues derived from participation in through interstate transportation. In its opinion, this Court specifically so states. (337 U.S. 662, at 663, n. 1.) In *Canton R. Co. v. Rogan, supra,* the question of the validity of the state franchise tax on a domestic corporation under the commerce clause was given only brief consideration. The only activity taxed which could possibly have been performed as a part of a joint through transportation operation was that described as "switching freight cars" from piers to lines of connecting railroads. The fact the activity is so described without elaboration strongly suggests it was not directly related to through interstate transactions.

Appellee's assertion that Appellant could not be subjected to a "multiple burden" of taxation because he was not amenable to tax in states other than California begs the issue. The constitutionally significant question under the commerce clause is whether any portion of the through revenue which California treats as allocable to other states.

Through the joint efforts of Appellant and others, shipments moved in interstate commerce for a single origin-to-destination charge. Every state such commerce touched had a right comparable with that of California to levy tax predicated upon revenues derived from that commerce. The California statute, as interpreted, necessarily attributes to California a greater portion of the through revenue than it would be entitled to tax if the through charge were prorated on a mileage basis. California attempts to justify this result on the premise that the non-highway functions of the through transportation performed by Appellant for the common benefit of all are not "proratable." The mileage proration method for allocation of the through revenue is premised upon the directly opposite concept that the activities comprising the through service are unsusceptible of division in relation to state boundaries. Therefore, multiple burdens of taxation on the through commerce are inevitable if any states the commerce touches apportions revenues according to the mileage proration method held constitutionally acceptable in *Central Greyhound Lines v. Mealey, supra,* and numerous other cases.

The fact that California taxes only that portion of the through charge the parties have agreed Appellant was entitled to receive for his contribution to the through transportation is not constitutionally significant. No presumption of fairness of the apportionment of through revenue among states for tax purposes arises from the agreements of the parties. Indeed, the fact that Congress has seen fit to vest in the Interstate Commerce Commission the power to impose divisions upon the parties to which they do not agree when it finds those agreed upon are unjust, unreasonable or inequitable

suggests strongly that the mere fact of agreement is no indication of fairness for any purpose. (49 U.S.C. §216(f).)

Appellee urges that in *Lehigh Valley Railroad Co. v. Pennsylvania,* 145 U.S. 192, *supra,* apportionment of tax on the basis of carrier agreement was approved. It is true that in *Lehigh Valley Railroad Co.* the amount taxed by Pennsylvania represented the portion of a through charge agreed upon between the carriers as the taxpayer's division. However, the division had been made on the basis of a mileage proration coinciding exactly with the relation of the miles traveled within Pennsylvania to the through miles. The question posed here by reason of the fact that the agreed divisions were other than on a mileage basis did not, therefore, arise in the cited case.

In the final analysis, the California statute, as interpreted by the State Court, taxes Appellant's revenues derived from participation in interstate transportation on an unapportioned basis. To say there has been a proration when all revenues are found taxable is pure sophistry. If Appellant's activities are to be treated as severable from the through transportation of which they were a part and considered as confined entirely within the state, the line of demarcation between that which is interstate and that which is intrastate disappears. In the very nature of things, there must be some out-of-state effect following from Appellant's activities in connection with the through transportation. Therefore, when the state presumes to tax all of Appellant's revenues derived from participation in through interstate transportation the tax bears on commerce among

the states and amounts to an attempt to regulate such commerce. This the state cannot do quite apart from any question of the burden which an improper apportionment produces. (*Galveston etc. R. Co. v. Texas*, 210 U.S. 217, *supra*, *Joseph v. Carter & Weeks Stevedoring Company*, 330 U.S. 422, *supra*.)

Conclusion.

The issue on the motion is whether substantial federal questions are presented by the appeal. By the motion, the Appellee highlights the number of such questions actually presented. Here, for the first time, this Court is called upon to decide:

(a) How and to what extent a state can impose a tax based on revenues of a carrier operating within a single state derived from his participation jointly with others in through interstate transportation.

(b) Whether under the commerce clause a state can allocate revenues from through interstate transportation for purpose of computing the amount of a highway use tax on any basis other than a mileage proration of the through charge.

(c) If so, whether constitutional requirements are met if the allocation of through revenues among states for tax purposes is predicated on carriers' private division agreements.

(d) Whether a state can designate a portion of an unsegregated through transportation charge as attributable to non-highway functions and predicate highway use tax upon revenues so allocated without apportionment.

The far reaching impact of the answers to these questions both upon the states and those directly concerned with interstate commerce is readily apparent. Premises considered, the motions to dismiss and affirm should be denied and the appeal considered upon its merits.

Respectfully submitted,

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